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ALTERNATIVE DISPUTE RESOLUTION: A NEW TOOL UNDER THE COMPANIES ACT 71 OF 2008

by

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ABSTRACT

The new Companies Act 71 of 2008 has introduced the use of alternative dispute resolution mechanisms as an alternative to the normal course of litigation. This paper is premised on section 166 of the Act headed “alternative dispute resolution”. The objective of this paper is to look at the application of alternative dispute resolution mechanisms, specifically the mediation, conciliation and arbitration process, within a company law perspective. This paper will examine the types of disputes that can be resolved through the aforementioned alternative dispute resolution processes and will also investigate how these mechanisms will work within the framework of the Act. The complexities that surround the interpretation of section 166 will be considered. My findings are that the applicability of section 166 does not have a blanket effect meaning that it will not be an appropriate enforcement remedy under all circumstances. Furthermore, the anomalies that have come with the enactment of the Act can be cured by applying the principle of reading-in.

A comparative study will be undertaken between, the relevant provisions, of the Act and other statutes such as the, Consumer Protection Act 68 of 2008, the National Credit Act 34 of 2005 and the Customs & Excise Act 91 of 1964. Lastly, the use of alternative dispute resolution mechanisms will be examined as a corporate governance tool, in that international trends have necessitated the reform of South Africa’s corporate governance regime. The use of alternative dispute resolution measures have been identified as a means of aligning South Africa’s corporate governance principles with international trends and as a corporate governance tool. This dissertation should be read in light of what is provided in the Preamble of the Act which states that the Act is aimed at providing appropriate legal redress.
1. INTRODUCTION

The lifeline of a company is influenced or dependent on its relationship with its stakeholders. However, very often when disputes arise between the company and such stakeholders the relationship is compromised and tarnished. Litigation is expensive and even when a matter does end up in court there are no guarantees that both parties will walk away happy with the outcome. The congested courts have made it rather unattractive for disputing parties to resolve their disputes through the normal court process, not only from a company law perspective but also within the context of other legislation. It is therefore not surprising that there are now alternative measures of resolving disputes from a company law perspective which is as a result of the enactment of the Companies Act 71 of 2008 ("the Act"). The Act is set out to bring about many changes in the regulation of company law in South Africa and amongst these changes are the enforcement remedies, as provided for in section 156 of the Act. This dissertation will seek to interrogate the use of alternative dispute resolution (hereafter referred to as "ADR") mechanisms within a company law perspective, the appropriateness of the use of such mechanisms and the extent to which such mechanisms may be used.

2. ALTERNATIVE DISPUTE RESOLUTION

2.1 A Brief Introduction and Background to Alternative Dispute Resolution Methods

The Act does not in itself define what ADR is. Therefore, and for the purposes of this discussion, ADR can be defined as consensual mechanisms that allow parties to a dispute to avoid public court litigation.¹ ADR measures are very wide, and there are different forms of these mechanisms.² As will be seen below, the Act only provides for the resolution of disputes

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¹ Ramsden The Law of Arbitration-South African and International Arbitration (2009) 1. This is true even where parties are bound by agreement to use ADR measures prior to any court processes in that a party that binds itself to such an agreement indirectly gives such consent and in some instances parties are allowed to object to the ADR proceedings which also presupposes the consensual nature of the ADR proceedings.

² These include formal discussions between the parties, problem solving, facilitation, the mini-trial, fact finding and relationship building initiatives. For a more detailed discussion on alternative dispute resolution tools see Van Niekerk & Schulze The South African Law of International Trade: Selected Topics (2011) 334.
through the mediation, conciliation, and arbitration process. The current discussion will therefore be confined to these processes. ADR processes are usually cheaper, quicker and a more successful way of resolving disputes because they are less complicated, less formal and result in significantly lower costs. ADR processes also usually facilitate the reaching of a settlement between the disputing parties.\textsuperscript{3}

In selecting the appropriate dispute resolution mechanism, there are various factors to be considered by the parties concerned. For example, the power relations between the parties; the levels of trust between the parties; the value placed by the parties on their future relationship;\textsuperscript{4} the extent to which a creative solution is possible; the need for the parties' co-operation in implementing or complying with a solution; the parties' desire to be paid attention to and to actively participate in the process; the parties' need to retain control over the outcome; the need for finality; the desirability of establishing a principle to govern the resolution of future disputes;\textsuperscript{5} the costs of the processes; the parties' need for privacy,\textsuperscript{6} and the need for expedition.\textsuperscript{7} The time available for the resolution of the dispute, the parties' rights, their interests\textsuperscript{8} and the expert recommendations\textsuperscript{9} are further factors to be considered by the parties in deciding on the appropriate dispute resolution mechanism.\textsuperscript{10}

\textsuperscript{3}See Botha, Rossini, Geach, Goodall, Du Preez and Rabenowitz The South African Financial Planning Handbook (2013) 72.

\textsuperscript{4}Litigation and processes involving an outcome imposed on both parties can destroy business relationships whereas mediation is designed to produce a solution that is most satisfactory to both parties, a win-win situation, and relationships may be preserved. Where relationships, particularly continuing business relationships are concerned, mediation or conciliation may be preferable. See, The Institute of Directors Southern Africa King Report on Corporate Governance for South Africa (2009) 14.

\textsuperscript{5}It should however be noted that where the issue in dispute involves a matter of principle and where the company desires a resolution that will be binding in relation to similar disputes in the future, ADR may not be suitable. In such cases court proceedings may be more appropriate, see Principle 8.6 set out in (n 4) above.

\textsuperscript{6}Private dispute resolution proceedings may be conducted in confidence, see Principle 8.6 set out in (n 4) above.

\textsuperscript{7}Butterworths Forms and Precedents Issue 3-2003 par 3.14.

\textsuperscript{8}The court process involves the decision-maker imposing a resolution of the dispute on the parties after having considered the past conduct of the parties in relation to the legal principles and rights applicable to the dispute. This inevitably results in a narrow range of possible outcomes based on the fundamental considerations of right and wrong. By contrast, mediation and conciliation allow the parties in fashioning a settlement of their dispute, to consider their respective needs and interests, both current and future. Accordingly, where creative forward-
2.2 Mediation

2.2.1 The Nature of Mediation

In his speech at a workshop delivered on mediation in Paris,\textsuperscript{11} Mervyn King pointed out that “commercial mediation in South Africa has a dual function; it is a mechanism for resolving disputes and a management tool”. Mediation can be defined as a voluntary confidential process in which the services of a neutral third party, the mediator,\textsuperscript{12} are used. The mediator is used in a dispute as a means of helping the disputing parties to arrive at an agreed solution.\textsuperscript{13} Mediation is not about getting what you want, but about coming to an amicable solution through compromise, it enables novel solutions, which a court may not otherwise achieve.

All decision-making powers in regard to the dispute remain with the parties,\textsuperscript{14} and although the mediator has no independent authority and does not render a decision, he or she will consider the parties’ needs rather than their rights and obligations.\textsuperscript{15} This should therefore be kept in mind when selecting a dispute resolution mechanism.

looking solutions are required in relation to a particular dispute and particularly where the dispute involves a continuing relationship between the parties, mediation and conciliation are to be preferred. See Principle 8.6 set out in (n 4) above.

\textsuperscript{9}This is in instances where the parties wish to negotiate a settlement to their dispute but lack the technical or other expertise necessary to devise a solution, a recommendation from an expert, for example the conciliator, who has assisted the parties in their negotiations may be appropriate. See Principle 8.6 set out in (n4) above.

\textsuperscript{10}See Principle 8.6 set out in (n 4) above.

\textsuperscript{11}Delivered at a workshop on mediation held by the Global Corporate Governance Forum, with the International Finance Corporation, Paris, 12 February 2007.

\textsuperscript{12}The mediator will assist the parties in exploring the options available to them in resolving their dispute and in this way the parties retain control over the proceedings and the outcome thereof. The mediator usually has the expertise that a court may not have.


\textsuperscript{14}See Principle 8.6 set out in (n 4) above.

\textsuperscript{15}(n 4) above 15.
Although this paper is aimed at looking at commercial mediation it is noteworthy to point out that the mediation process is generally becoming an integral part of the court process. The Draft Mediation Rules for the High Court and Magistrates Court, ("the Draft Rules") introduce court aligned mediation; a process in which parties to litigious proceedings are by court instruction, required to attempt to mediate their matters in order to reach a settlement before having a matter set down for court hearing. Court-based mediation will advance access to justice; it will reduce litigation costs as well as the delays that are associated with the resolution of disputes between litigants through normal court proceedings.\(^\text{16}\) The Draft Rules seek to encourage peace between litigants, without having to fight in court.

Court-based mediation would result in the court rolls being less crowded and cases being settled or taken out of the litigation process, even if temporarily. Moreover, the relationships between litigants would be preserved rather than strained by the adversarial nature of litigation; and the process would be more creative than adversarial proceedings and would provide resolution options beyond the scope and functions of judicial officers.\(^\text{17}\) There is no doubt that these benefits will be equally important and beneficial to commercial mediations.

The Draft Rules make it mandatory for the registrar to refer the matter to a dispute resolution administrator, once a notice of intention to defend has been received by a plaintiff, who will then set down the mediation between the parties.\(^\text{18}\) The parties are not bound by this mediation process and may consequently refuse to participate in it, but this may have cost implications for them.\(^\text{19}\)

\(^{16}\)See Rule 2 of the Draft Rules.

\(^{17}\)Sedutla "The Launch of court-based mediation pilot project" January 2012 De Rebus 8.

\(^{18}\) See Rule 3 of the Draft Rules.

\(^{19}\)See www.tokiso.com last visited on 09/01/2013.
2.3 Conciliation

In its very nature conciliation is similar to the mediation process in that the purpose is also to seek the settlement of the dispute through a consensus building exercise.\textsuperscript{20} Conciliation is a structured negotiation process involving the services of an impartial third party, the conciliator, who makes formal recommendations to the parties as to how the dispute can be resolved.\textsuperscript{21} Conciliation can, similarly to the mediation process, be useful in circumstances where, parties want to control the outcome of their dispute; relationships are important; there is no great divergence in power; confidentiality is important; neither side wishes to litigate; and where timeous resolution is important.\textsuperscript{22}

Both the mediation and conciliation process will naturally require the participation and presence of persons empowered and mandated to resolve the dispute. Therefore, given that the company acts through its directors it is important to select the appropriate individual(s) to represent the company in ADR processes.

\textsuperscript{20}Butterworths \textit{Forms and Precedents} Issue 3-2003 par 3.14.

\textsuperscript{21}See Principle 8.6 set out in (n 4) above.

\textsuperscript{22}Butterworths \textit{Forms and Precedents} Issue 3-2003 par 3.14.
2.4 Arbitration

Arbitration can be defined as a process in which a third party hears the parties’ respective cases and then determines the dispute between them by making an award. The mediation and conciliation processes are generally preliminary steps to the arbitration process.\textsuperscript{23} However, in contrast to the arbitrator’s award, the recommendations made by the conciliator and the mediator are not binding on the parties.\textsuperscript{24} There are various forms of arbitrations;\textsuperscript{25} however, only two will be mentioned for the purposes of the current discussion, namely, the so-called statutory arbitrations\textsuperscript{26} and ex-parte arbitrations.\textsuperscript{27}

The binding nature of the arbitration makes it worthwhile to mention the sources of the Law of Arbitration, that being; the common law, the Arbitration Act 42 of 1965 ("the Arbitration Act"), the Constitution of the Republic of South Africa 108 of 1996 ("the Constitution"), the (South African) Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977 and the UNCITRAL Model Law on International Arbitration.\textsuperscript{28}

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\textsuperscript{23}Ramsden (n 1) 1. It should however, be noted that there is nothing in the Act that suggests that the mediation process and/or the conciliation process as preliminary steps to the arbitration process.

\textsuperscript{24}See Botha, Rossini, Geach, Goodall, Du Preez and Rabenowitz The South African Financial Planning Handbook (2013)72.

\textsuperscript{25}See Ramsden (n 1) 5-10 for a more detailed discussion.

\textsuperscript{26}Statutory arbitration is where legislation, for example the Labour Relations Act 66 of 1995, mandates that specific types of disputes must be submitted to arbitration for resolution and may not be placed before the court. See, Ramsden (n 1) 5.

\textsuperscript{27}Ex parte arbitration is a form of arbitration where only one party, usually the claimant, attends the hearing and promotes his case. The other party, usually the defendant, may or may not have submitted a statement of defence, but decides against attending the hearing. Although the defendant may not attend the proceedings, the claimant is still required to prove his or her case. However, there is no award equivalent to a default judgment as provided for in the rules of court, Ramsden (n 1) 9.

\textsuperscript{28}Ramsden (n 1) 13 to19.
3. **THE COMPANIES ACT 71 OF 2008-AN INTRODUCTION**

The Act came into effect on 1 May 2011 and it generally uses a system of administrative enforcement in the place of criminal sanctions to ensure compliance with the Act. Moreover, the Act is, amongst other things, aimed at, and what is important for purposes of this paper, providing appropriate legal redress for investors and third parties with respect to companies. It is the author’s submission that in providing the appropriate legal redress, it is important to apply the correct enforcement tools to the dispute at hand. The applicability and the appropriateness of the use of alternative dispute resolution mechanisms as enforcement remedies will be considered in the discussion below.

4. **ENFORCEMENT AND REMEDIES**

4.1 **Section 156- Alternative Procedures for Addressing Complaints and/or Securing Rights**

All legal rules and/or rights are ineffective unless they are enforced and in enforcing such rights and/or legal rules the appropriate enforcement remedy should be used. Disputes that fall within the ambit of the Act can be resolved in one of four ways. In other words, a person who has the necessary locus standi may seek to address an alleged contravention of the Act; to enforce any provision of the Act; or a right in terms of the Act, a company’s memorandum of incorporation or rules; a transaction or agreement contemplated under the Act; or the company’s memorandum of incorporation or rules in one of the following ways. Firstly, a person can attempt to resolve any dispute with or within a company through alternative dispute resolution in accordance with Part C of Chapter 7; secondly, through adjudication by the Tribunal on application by the relevant person(s); thirdly, through the normal court process, by applying for the appropriate relief to the relevant division of the High Court that has jurisdiction over the matter and lastly, by filing a complaint with either the Takeover

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30 See section 156(1)(a).

31 See section 156 (1)(b).

32 See section 156(1)(c).
Regulation Panel ("the Panel") or the Companies and Intellectual Commission ("the Commission") in accordance with Part D of Chapter 7 of the Act, depending on which of the latter two institutions have jurisdiction over the matter.\textsuperscript{34} The parties should therefore, ensure that they choose the appropriate enforcement remedy that will best be suited to their needs.

4.2 Section 166- Alternative Dispute Resolution

In its Explanatory Memorandum on the Companies Bill, the Department of Trade and Industry stated that the Commission and/or the Panel may, after receiving complaints from any stakeholder or at the request of another regulatory authority, urge the parties to attempt voluntary alternative resolution.\textsuperscript{35} This principle is resonated in section 166(1) of the Act which provides that:

"As an alternative to applying to court, or filing a complaint with the Commission in terms of Part D, a person who would be entitled to apply for relief, or file a complaint in terms of the Act, may refer a matter that could be the subject of such an application or complaint for resolution by mediation, conciliation or arbitration to-

(a) the Companies Tribunal;

(b) an accredited entity, as defined in subsection (3) or

(c) any other person."

The limits placed by the lawmaker with regards to the type of complaints that may be resolved through ADR measures are clearly aimed at restricting the type of complaints that may ultimately be resolved through the ADR process. It will however, be seen that the use of ADR measures is actually extended to instances where a complaint has also been filed with the Panel; and that the application of section 166(1) is not limited to the complaints that may be filed with the Commission. It is important to note that although a party may be entitled to

\textsuperscript{33} According to section 219 of the Act, the complaint must be filed with the relevant body within the prescribed time period of three years.

\textsuperscript{34} See section 156(1) (d). Moreover, the functions and composition of the Commission are briefly discussed below; the functions of the Takeover Regulation Panel are however, beyond the scope of the current discussion.

\textsuperscript{35} See section 167 of the Department of Trade and Industry, Explanatory Memorandum on the Companies Bill (2007) at 15.
have a matter resolved through ADR proceedings, this right is not an absolute right, in that the other party must still consent and/or agree to the proceedings. Moreover, there are other legislative provisions such as the National Credit Act 34 of 2005, which allow parties to even object to the referral of a dispute to an alternative dispute resolution agent.

The purpose of section 166(1) is to provide a mechanism for the resolution of disputes other than applying to court for relief or filing a complaint with the Commission or the Panel. The referral to the Companies Tribunal\textsuperscript{36} ("the Tribunal") or an accredited entity must be made on a CTR 132.1 form.\textsuperscript{37} The voluntary and consensual nature of alternative dispute resolution measures is echoed by the wording of section 166(1) which provides that a matter may be resolved through mediation, conciliation or arbitration. Moreover, the applicability of section 166(1) does not have to be triggered by the conclusion of any prior agreement(s) between the parties.

Nonetheless, the use of alternative dispute resolution measures will, under certain circumstances, be mandatory. A company's memorandum of incorporation is a binding agreement between the company and its shareholders and/or its directors and/or any other person serving the company as a member of a committee.\textsuperscript{38} Therefore, an alternative dispute resolution clause in a company's memorandum of incorporation that requires any dispute between the company and its shareholders to be resolved through arbitration, for example, will be enforceable by the relevant parties in the event of a dispute arising between the company and its shareholder(s). It should however, be noted that it is insufficient for a party to merely aver the enforceability of an alternative dispute resolution clause,\textsuperscript{39} the terms of the dispute should also warrant the applicability of such a clause.\textsuperscript{40}

\textsuperscript{36} Means the Companies Tribunal established in terms of section 193 of the Act, see section 1 of the Act. The Tribunal was formally known as the Companies Ombudsman under the Companies Act 61 of 1973.

\textsuperscript{37} See Regulation 132(1) of the Act.

\textsuperscript{38} See section 15(6) of the Act.

\textsuperscript{39} In Peel and Others v Hamon J&C Engineering (Pty) Limited and Others 2013 (2) SA 331 (GSJ), the South Gauteng High Court held that the dispute before the court did not arise from the said Sale and Transfer Agreement and the Shareholders' Agreement and therefore the arbitration clause did not apply.

\textsuperscript{40} See PCL Consulting (Pty) Ltd v Tresco Trading 119 (Pty) Ltd 2009 (4) SA 68 (SCA) 8.
Moreover, a person relying on section 166(1) is only entitled to the relief provided for in the Act. Therefore on a narrow interpretation of section 166, it would seem as though the relief that may be sought by an aggrieved party through conciliation, mediation and arbitration is limited to what is contained in the Act. This is however, contradicted by section 156(1)(a) of the Act which allows a party to enforce any provision of a company’s memorandum of incorporation or rules or a transaction or agreement contemplated in the Act, the company’s memorandum of incorporation or rules through alternative dispute resolution. The use of alternative dispute resolution measures flowing from a transaction or agreement contemplated in the Act and/or an alternative dispute resolution clause in a company’s memorandum of incorporation or rules is however, beyond the scope of the current discussion.

The Act provides for various forms of relief and it introduces new and more effective remedies for minority shareholders.\textsuperscript{41} An in-depth analysis of the applicability of alternative dispute resolution mechanisms as an enforcement remedy in each and every instance is beyond the scope of this paper. The current discussion will therefore, be limited to the specific remedies; meaning those that apply in particular circumstances and that are contained in section 160 to 165 of the Act. A few examples of some of the remedies provided for in other sections will nonetheless be considered briefly, namely those contained in section 20(4), 20(5), 20(6) and 218(2) of the Act. What will be considered in the following section is whether or not the specific remedies can be enforced through ADR mechanisms.

4.2.1 Section 160-Disputes Concerning the Registration or Reservation of Company Names

Section 160 is the first in a series of provisions detailing the specific remedies under the Act and it explains how a dispute concerning the name of a company is to be dealt with. The dispute can be about the reservation or registration of a company name.\textsuperscript{42} ADR measures are usually a means of helping the disputing parties to arrive at a solution agreed by them, through the assistance of a neutral third party. It would therefore not be competent to use

\textsuperscript{41} Cassim et al (n 29) 23.

\textsuperscript{42} Delport Henochsberg on the Companies Act 71 of 2008 555-557.
ADR mechanisms in respect of disputes where the issue concerns the reservation or registration of the name of a company as such disputes are of such a nature that the parties are unlikely to reach an agreed solution. Put differently, disputes pertaining to name reservations and the like are adversarial in nature, it is therefore, highly unlikely that parties to such disputes would be able to reach an agreed solution thereon. The Tribunal will make an independent determination irrespective of what the parties desire, through the adjudication process in such circumstances. The Tribunal has a dual power in term of this section. It firstly has to make a determination on whether the name complies with the requirements of the Act\textsuperscript{43} and may also make an administrative order containing directives.\textsuperscript{44} The alternative dispute resolution process would therefore not be an appropriate enforcement mechanism.

4.2.2 Section 161- Application To Protect the Rights of a Securities Holder

A securities holder can enforce its rights by bringing an *ex-par
t*e application to court for the appropriate relief that is necessary to protect its rights or to rectify any harm to such a securities holder.\textsuperscript{45} Therefore, as an alternative to bringing such an application before a court a securities holder can enforce its rights by bringing the so-called *ex-par
t*e arbitration before an alternative dispute resolution agent.

4.2.3 Section 162-Application to Declare a Director a Delinquent or Under Probation

Sections 162(2), (3) and (4) of the Act allows three categories of possible applicants to bring court applications declaring a person a delinquent director or under probation.\textsuperscript{46} The Act does

\textsuperscript{43} See section 160(3)(a).

\textsuperscript{44} See section 160(3)(b).

\textsuperscript{45} See section 161(1) (b) of the Companies Act.

\textsuperscript{46} For example, in *Msimang NO and another v Khatuliba and others* 2013 1 All SA 580 (GSI), an application was brought forth declaring the respondent directors as delinquent directors in terms of section 162(5)(c)(iv)(aa) of the Act. The court found that the respondent directors breached had their fiduciary duties towards the company as a result of their failure *inter alia* to prepare the company’s financial statements and to convene the company’s annual general meeting and therefore declared them as delinquent directors under section 162, at paragraph 70.
not in itself stipulate which matters may or may not be resolved through the ADR processes that are provided for under the Act therefore, the Arbitration Act,\textsuperscript{47} can be of some assistance in this regard. Section 2 of the Arbitration Act prohibits the referring of matrimonial matters and matters relating to status to arbitration, therefore, an order declaring a director a delinquent will most certainly affect such a person’s status, in that, he or she will be disqualified from acting as a director. As a result, the use of ADR tools in such circumstances would be inappropriate. An order that alters a person’s status will fall within the ambit of the court’s powers.

4.2.4 Section 163-Relief from Oppressive or Prejudicial Conduct or from Abuse of the Separate Juristic Personality of a Company

Section 163 provides a shareholder or director with relief from any oppressive or prejudicial conduct that unfairly disregards the interests of such a director or shareholder.\textsuperscript{48} There are a number of circumstances that could give rise to the remedy under section 163 becoming available.\textsuperscript{49} A shareholder or director that can show that the conduct that is being complained of is oppressive and that it is unfairly prejudicial to it, can approach an alternative dispute resolution agent for intervention. An arbitrator can, for example, make an order directing the company to compensate an aggrieved shareholder or director, subject to any other law entitling such a shareholder or director to compensation.\textsuperscript{50} Section 163(2) sets out an extensive, but non-exhaustive list of remedies,\textsuperscript{51} it is important for the applicant/ claimant to

\textsuperscript{47}Supra, also see section 40 of the Arbitration Act.

\textsuperscript{48}In Grancy Property Limited v Manola and others 2013 JOL 30705 (SCA), the Supreme Court of Appeal held that section 163 of the Companies Act 71 of 2008 provides a shareholder with a remedy against any oppressive or unfairly prejudicial acts of a company or related person that unfairly disregards the interests of such a party. In considering what constitutes oppressive conduct as used in section 163, the court found that what is contemplated is conduct which is wrongful and unjust. Moreover, engaging in inappropriate conduct and failing to remedy such conduct, which exposes others to serious risk has been held as amounting to prejudicial and oppressive conduct, see Peel and Others v Homan J&C Engineering (Pty) Limited and Others 2013 SA 331 (GJ) 55, where the primary relief sought by the applicants was to sever ties with the respondents.

\textsuperscript{49}For a more detailed discussion on section 163 see (n42) 568.

\textsuperscript{50} See section 163(2) (j).

\textsuperscript{51} HI Cassim, MF Cassim, R Cassim, Jooste, Shev, Yeats Contemporary Company Law (2011) 695.
assist the body facilitating the alternative dispute resolution proceedings by setting out and indicating the general nature of the relief sought.\textsuperscript{52}

\textbf{4.2.5} Section 164- Dissenting Shareholders Appraisal Rights

A dissenting or disgruntled shareholder that wishes to be bought out of a company can, in the appropriate circumstances, demand payment of the fair value of its shares from the company. If however, the company fails to make an offer for the shares or has made an offer that the shareholder considers to be inadequate then the shareholder can apply to court to determine a fair value in respect of the shares and for an order requiring the company to pay that amount.

As an alternative to approaching the court for relief in the aforementioned circumstances, a neutral third party can help the parties come to an agreeable settlement with regards to the value of the shares, where a dissenting shareholder demands payment of the fair value of its/his/her shares. If however, the parties cannot come to an amicable settlement, then nothing prevents the parties from referring the matter to arbitration, where the arbitrator can, make a final and binding determination with regards to the dispute between the company and the shareholder.

A dissenting shareholder only becomes \textit{entitled} (my emphasis) to be paid the fair value of the shares once the dissenter has taken the necessary and mandatory steps to “perfect” the appraisal remedy.\textsuperscript{53}

A shareholder that has approached an alternative dispute resolution agent for the relief provided for in section 164 will, in the appropriate circumstances, consequently be required to follow the same steps.

\textsuperscript{52} Lourenco v Ferela (Pty) Ltd (No 1) 1998 (3) SA 281 (T); Re Antigen Laboratories Ltd [1951] 1 All ER 110 (Ch); Breetveld v Van Zyl 1972 (1) SA 304 (T).

\textsuperscript{53} Cassim et al (n 29) 720. An in-depth analysis of the intricate steps to be followed under section 164 are beyond the current discussion. For a more detailed discussion see, Cassim et al (n 29) 721-729.
The directors of a company and those who control the internal affairs of the company are usually tasked with protecting the legal interest of the company.\textsuperscript{54} What if the company’s legal interests are then compromised by the very people who are tasked with protecting such interests? Section 165(2) allows certain persons other than the company to serve a demand upon a company to commence or continue legal proceedings; or to take related steps on behalf of the company in order to protect the legal interests of the company.\textsuperscript{55}

The company can however, apply to court to set aside the demand.\textsuperscript{56} If the demand is not set aside then the company \textit{must} (my emphasis) take particular steps and conduct the necessary investigations into the demand.\textsuperscript{57} The person who has made the demand may apply to the court for leave to bring or continue proceedings in the name of the company, if the company has, for example,\textsuperscript{58} failed to take any particular step required by section 165(4).\textsuperscript{59}

A person must obtain the necessary leave to institute proceedings on behalf of the company, it is the author’s submission that as an alternative to applying to court for leave to institute legal proceedings, once the demand has been served on the company,\textsuperscript{60} a person with the necessary \textit{locus standi} can refer the matter to an alternative dispute resolution agent in terms of section 166(1). It therefore, becomes equally as important for the body facilitating the alternative dispute resolution proceedings to conduct the relevant investigations into the demand.

\textsuperscript{54} See Cassim et al (n 29) 699.

\textsuperscript{55} It should be noted that this remedy is aimed at protecting the company’s legal interests and not so much the person instituting the proceedings interests.

\textsuperscript{56} See section 165(3).

\textsuperscript{57} See section 165(4).

\textsuperscript{58} See section 165(5), it should be noted that section 165(5) lists other grounds on which the court’s leave may be obtained.

\textsuperscript{59} See Section 165(5)(a)(i).

\textsuperscript{60} It is an essential prerequisite to serve the demand before instituting an application under section 165, see, \textit{Mowitzen v Greystone Enterprises (Pty) Ltd} 2012 (5)SA 74 (KZD) 24. It should however, be noted that the court can in exceptional circumstances grant leave to bring proceedings without making the prior demand, see section 165(6).
The company can also, in the appropriate circumstances, respond to a demand served on it in terms of section 165(2) by referring the matter to an alternative dispute resolution agent.

Moreover, the court will not grant a party leave to act on behalf of a company without *inter alia* being satisfied that it is in the best interests of the company to institute such proceedings. The elements and circumstances that will be considered by the court in determining whether granting leave would be in the best interest of the company include considering whether or not there are any other means of obtaining the same redress so that the company does not have to be brought into litigation against its will.\(^{61}\) Therefore, a company could possibly oppose an application made to court in terms of section 165(5), on the grounds that the matter has been referred to an alternative dispute resolution agent.

There are a number of actions that a company can take after being served with a demand,\(^ {62}\) which include taking *related steps* (my emphasis) to protect the legal interests of the company. The term *related steps* is not defined in the Act. Therefore, on a purposive interpretation this could be interpreted as instituting alternative dispute resolution proceedings.

### 4.2.7 Other Remedies

The shareholders, directors or prescribed officers of a company can, in the appropriate circumstances, apply to the High Court (my emphasis) for an appropriate order to restrain the company from doing anything inconsistent with the Act,\(^ {63}\) or the company’s memorandum of incorporation as contemplated in section 20(2). Will an alternative dispute resolution agent then be able to grant the aforementioned relief?

The wording of section 20(4) and 20(5) seems to suggest that *only* the High Court has jurisdiction to grant restraining orders. Moreover, the Constitutional Court in *National Treasury and others v Opposition to Urban Tolling Alliance and others* (Road Freight

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\(^{61}\)See Delport (n 42) 586(5).

\(^{62}\) See section 165(4)(b).

\(^{63}\) See section 20(4), it should be noted that a trade union representing the employees of the company also have the same statutory right.
Association as applicant for leave to intervene), stated that whilst a court has the power to grant a restraining order, it will not readily do so except when a proper and strong case has been made out for the relief and, even so, only in the clearest of cases. A restraining order is therefore, an exceptional remedy that even the courts are reluctant to grant. As a result, it is doubtful that an entity, other than the High Court will have the power to grant a restraining order under the auspices of section 20(4) and 20(5). It should however, be noted that the damages that can be claimed under section 20(5) are separate issue, and there is nothing that suggests that such damages cannot be claimed through alternative dispute resolution mechanisms.

Section 20(6) provides a remedy for damages against a person who fraudulently or due to gross negligence causes the company to act inconsistently with the Act. There is no logical reasoning as to why an arbitrator, for example, cannot make an award with regards to such damages, after considering the parties’ submissions and evidence. Over and above the specific remedies provided for under the Act, the general remedy contained in section 218(2) affords a person who has suffered damages as a result of another person contravening any provision of the Act with further relief. These damages can, in the appropriate circumstances, now be claimed under the provisions of section 166(1).

5. FILING A COMPLAINT

5.1 Introduction

As already pointed out, the provisions of the Act will be of no force and/or effect where there is no compliance with such provisions. As a result, where there is none such compliance or where a complainant’s rights under the Act or under a company’s memorandum of incorporation or a company’s rules, have been infringed, a section 168(1) complaint can be filed with either the Commission or the Panel by the person so affected. However, instead of filling such a complaint the newly enacted section 166(1) now gives a complainant the option

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642012 (11) BCLR 1148 (CC) 1151, where the relief that was sought was a temporary restraining order.

65See National Treasury and others v Opposition to Urban Tolling Alliance and others (Road Freight Association as applicant for leave to intervene) 2012 (11) BCLR 1148 (CC) 1151.
of referring such a matter to either the Tribunal, an accredited entity or any other person for resolution by mediation, conciliation or arbitration. In as much as a complainant can have the subject matter of a complaint resolved through alternative dispute resolution, it is important to note that section 166(1) specifically provides for only those complaints that would have been filed with the Commission and not the Panel to be resolved through ADR. However, on a proper construction of section 169(1) (b), it will be demonstrated that the applicability of section 166(1) extends to instances where a complaint has been filed with the Panel.

5.2 The Procedure in Lodging a Complaint

As already pointed out, section 168 essentially deals with the filing of complaints with either the Panel or the Commission. The complaint must be in writing on a completed CTR 132.1 form. Moreover, a complaint may be initiated directly by the Commission or the Panel on its own motion or at the request of another regulatory authority. The Minister may also direct the Commission to investigate an alleged contravention of the Act or in other specified circumstances. However, a complaint may not be prosecuted against any person that is, or has been a respondent in proceedings under another section of the Act relating substantially to the same conduct. After receiving a complaint and before taking any further action, the Commission or the Panel, as the case may be, must conduct preliminary investigations into the complaint. The Commission or the Panel can thereafter either:

(a) reject the complaint, except in cases where the complaint was referred by the Minister, by issuing the complainant with a compliance notice indicating that it will not investigate the complaint, if found that the complaint appears to be frivolous or

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66 See section 168(1)(a).
67 See section 168(1) (b).
68 See Regulation 132(1) of the Act.
69 See section 168(2).
70 See section 168(3).
71 See section 219(2). This section therefore echoes the double jeopardy principle in our law.
72 See section 169.
vexatious or the matter complained of does not give rise to a remedy under the Act;\textsuperscript{73} or

(b) where it is deemed to be an appropriate means of resolving the matter expeditiously, refer the complaint to the Companies Tribunal or an accredited entity, as defined in section 166(3),\textsuperscript{74} with a recommendation that the complainant seek to resolve the matter with the assistance of that agency or person,\textsuperscript{75} or

(c) in other cases, direct an inspector\textsuperscript{76} or investigator to investigate the complaint as quickly and practicable as possible, this could be with or without the assistance of a designated person(s) to help the inspector or investigator to conduct the investigation.\textsuperscript{77}

The Commission or Panel can, in instances where the complaint is internal to a particular company, and does not appear to implicate a party other than the company, appoint the relevant persons to investigate a complaint. The expense of paying an investigator appointed jointly by the company and the Commission or Panel will be carried by the company, or be dealt with on a cost-shared basis.\textsuperscript{78}

Therefore, where a complaint has been referred for mediation, conciliation or arbitration in terms of section 166(1), then the Tribunal, an accredited entity or any other person, as the case

\textsuperscript{73}See section 169(1) (a).

\textsuperscript{74}It is the author’s submission that the words “or any other person” are to be read-in to remedy the legislature’s failure to insert the words “any other person” as contemplated in section 166(3).

\textsuperscript{75}See section 169(1) (b), as amended by section 107 of the Companies Amendment Act 3 of 2011. The referral is to be made on CTR 132.2, see Regulation 132(2) of the Act.

\textsuperscript{76}As appointed by section 209 of the Companies Act.

\textsuperscript{77}Section 169(1) (c) read with 169(2). The investigator will report to both the company and the Commission or the Panel, see section 169(2) (b) (i) (bb). If however, the company does not agree to a joint appointment where the matter is internal to the company, then the Commission or Panel can apply to court for an order appointing an independent investigator at the company’s expense, see section 169(2)(b)(ii)(aa). The investigator will once again report to both the Commission or Panel and the company, see section 169(2)(b)(ii)(bb).

\textsuperscript{78}See section 169(2) (b) (i) (aa).
may, be will be tasked with conducting the necessary investigations itself or in the appropriate circumstances also unilaterally or jointly appoint an inspector at the company’s expense.

Although the wording of section 166(1) seems to suggest that only the complaints that have been filed with the Commission can be resolved through alternative dispute resolution mechanisms, the application of section 169(1) (b) clearly extends the application of section 166(1) to even those complaints that have been referred to the Panel. In other words, section 169(1)(b) indirectly makes section 166(1) applicable to those complaints that have been referred to the Panel.\textsuperscript{79} Moreover, and as will be seen below,\textsuperscript{80} the Tribunal acts as both an adjudicative body and an alternative dispute resolution agent. Therefore, the referral of a complaint under section 169(1)(b) to the Tribunal should be distinguished from instances where a complaint has been referred to the Commission or the Tribunal under section 170(1)(b)\textsuperscript{81} where the Tribunal acts as an adjudicative body.

6. \textit{Locus Standi}

It is imperative for the party invoking the provisions of section 166 to have the necessary \textit{locus standi}, meaning to have the right to bring or initiate the proceedings before the Tribunal an accredited entity or before any other person. A lack of \textit{locus standi} can always be used as a defence by a party who is resistant to referring a matter for mediation, conciliation and/or arbitration. Section 166 enables \textit{any person} who would be entitled to apply for relief or file a complaint in terms of the Act to have a matter resolved through either mediation, conciliation or arbitration, meaning that, a person who has a right to file a complaint and/or enforce a

\textsuperscript{79}Meaning that those complaints that have been filed with the Panel in respect of a matter contemplated in Part B or C of Chapter 5 of the Act, or in the Takeover Regulations. The Commission is, on the other hand, mandated to deal with the complaints in respect of the other matters under the provisions of the Act. See section 168(1). An in depth analysis of these complaints is however, beyond the scope of the current discussion.

\textsuperscript{80}See below the discussion on the Tribunal.

\textsuperscript{81}The outcomes of an investigation conducted by an investigator or inspector can be dealt with by the Commission or Panel in one of six ways; one of them being the referral of the complaint to the Tribunal, the Commission or the Panel as the case may be, if the matter falls within their respective jurisdictions in terms of the Act, see section 170(1) (b).
particular right under the relevant provisions of the Act will consequently also have the right to invoke the applicability of section 166(1).

For example, section 165(2) entitles the following persons to commence or continue legal proceedings or to take related steps in order to protect the legal interests of the company; a shareholder or a person entitled to be registered as a shareholder;\textsuperscript{82} a director or prescribed officer;\textsuperscript{83} a registered trade union that represents the employees of the company or another representative of employees of the company;\textsuperscript{84} or a person that has been granted the necessary leave by the court to protect the legal interests of the company.\textsuperscript{85} Such persons will therefore, have the \textit{locus standi} to bring a matter before the Tribunal, an accredited entity or any other person in terms of section 166(1).

It is the author’s further submission that a person acting on behalf of a person directly contemplated in a particular provision of the Act but who cannot act in their own name or a person acting as a member of or in the interests of; a group or class of affected persons; an association acting in the interest of its members; or one who is acting in the public interest; with leave of the court as provided for in section 157(1) will also have the necessary \textit{locus standi} to have a matter resolved through alternative dispute resolution mechanisms. The Commission, Panel and the Minister, who have the right to initiate complaints under section 168, may consequently also bring a matter before an alternative dispute agent in terms of section 166(1). Furthermore the company will, in the appropriate circumstances, equally be entitled to resolve a matter through alternative dispute resolution measures. What may however be challenging is the enforceability of an arbitrator’s award, for example, against other securities holders in class actions.\textsuperscript{86} The creditors of a company who have a right to claim damages under the relevant provisions of the Act have the necessary \textit{locus standi} to invoke the applicability of section 166(1) in the appropriate circumstances.

\textsuperscript{82}See section 165(2)(a).
\textsuperscript{83}See section 165(2) (b).
\textsuperscript{84}See section 165(2) (c).
\textsuperscript{85}See section 165(2)(d).
\textsuperscript{86}See Delport \textit{"The New Companies Act Manual (2009) 122.}
7. THE COMPANIES TRIBUNAL

A distinction should be drawn between the alternative dispute resolution processes and the institutions that facilitate such processes.\footnote{See Principle 8.6 set out in (n 4) above.} Section 166 makes provision for three types of entities that can facilitate the ADR process namely; the Tribunal, an accredited entity or any other person. It is incumbent upon such institutions to grant the appropriate relief when facilitating ADR proceedings. The following section will therefore take a closer look at these entities.

7.1 Introduction

The Tribunal, although a member of the Department of Trade and Industry group, it is a new independent regulatory body established under section 193 that is subject to the Constitution and the law. The Tribunal has jurisdiction throughout the Republic of South Africa.\footnote{Section 193(1)(a)(b).} Its independence is entrenched by the fact that it must perform its functions impartially\footnote{The impartiality and independence of the Tribunal is in relation to the parties in dispute an indispensable requirement of the alternative dispute resolution process, see Principle 8.6 as set out in (n 4) above.} without any fear, favour, or prejudice and in a transparent manner as well as having regard to the nature of the specific function being fulfilled.\footnote{Section 193(1)(d).} Moreover, when performing its functions the Tribunal must do so in line with the Act.\footnote{Section 193(1)(c).} The Tribunal has specifically been formed to \textit{inter alia} facilitate alternative dispute resolution within company law.\footnote{See Preamble of the Act.}
7.2 Composition and Functions of the Tribunal

The Tribunal is a quasi-judicial body, that consists of eleven members appointed by the Minister and who have the appropriate experience and qualifications.\textsuperscript{93} The members of the Tribunal can either serve on a full-time or part-time basis,\textsuperscript{94} and may be removed from office by the Minister or even resign from office.\textsuperscript{95} According to section 194(1) of the Act the members of the Tribunal were to be appointed by the Minister by no later than 1 May 2011, when the Act came into operation. It is interesting to note that the current members of the Tribunal were only, appointed in January 2012.\textsuperscript{96} The Tribunal, can either act through its panel of members or through a single member,\textsuperscript{97} and it has a dual mandate, namely to serve as an adjudicative body on disputes or provisions affecting rights in terms of the Act.\textsuperscript{98} The Tribunal thus serves as an appeal and review body for the decisions of the Commission on the one hand and can act as either a mediator, conciliator or arbitrator on the other hand.\textsuperscript{99}

\textsuperscript{93}section 194(3) and 205 of the Act.
\textsuperscript{94}section 193(4).
\textsuperscript{95}section 207 of the Act.
\textsuperscript{96}“Members of the Companies Tribunal”
(23/01/2014).
\textsuperscript{97}See section 195(1). The Tribunal can therefore through a single member act as mediator, conciliator or arbitrator.
\textsuperscript{98}See section 195(1)(a). For example in the ex parte application of World Marine & Offshore Supply Co. (Pty) Ltd the Tribunal CTR 12/07/2013, acting through one of its members Ms. N Zondo, the Tribunal adjudicated on a matter where the applicant sought an exemption from appointing a Social and Ethics Committee as required by the Act, where it was held that the Tribunal would not just make such exemptions as it must be fully satisfied that such exemptions are warranted.
\textsuperscript{99}It has been submitted that the alternative dispute procedure is not available to affected persons in instances where the Act provides for direct application to the Tribunal. See, Manumela “The Companies Tribunal: A new source of work for attorneys” November 2011 De Rebus 32.
8. **AN ACCREDITED ENTITY**

The second type of body that may facilitate alternative dispute resolution proceedings under the auspices of section 166 is an accredited entity. An accredited entity can either be a juristic person, or an association of persons that have been accredited by the Commission in terms of section 166(4),\(^{100}\) or an organ of state or an entity established by or in terms of a public regulation that is mandated *inter alia* to perform mediation, conciliation or arbitration proceedings and (my emphasis) that has been duly designated by the Minister of Trade and Industry in terms of section 166(5) as an accredited entity.\(^{101}\) Furthermore, the Commission is responsible for monitoring the effectiveness of accredited entities against the background of the purposes and policies of the Act, and in monitoring the effectiveness of an accredited entity which the Commission may upon reasonable notice, require certain information from such an entity.\(^{102}\)

Moreover, should an accredited entity no longer satisfy the criteria mention in section 166(4)(a) then the Commission may withdraw its accreditation.\(^{103}\) An association of persons or a juristic person that predominantly provides alternative dispute resolution services and that has demonstrated capacity to perform such services within the context of company law, may be accredited by the Commission. Furthermore, it must be demonstrated that such a person

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\(^{100}\)See section 166(3) (a).

\(^{101}\) See section 166(3). It is not peremptory neither is it mandatory for the Minister to consult the Commission before making any designations. However, in light of the fact that the Commission is the watchdog over the accredited entities, it would be advisable for the Minister to consult the Commission in making such designations. What cannot be disputed is that once the Minister has made the necessary designations he or she *must* prescribe the criteria for the Commission to follow in assessing whether an entity meets the necessary requirements for accreditation. See section 166(3) (b) read with section 166(5).

\(^{102}\) See section 166(4)(b) and (c). The Commission may for example, require the relevant individuals to provide the necessary proof that they are qualified to facilitate ADR proceedings. The recommendations and awards made by such accredited entities to the parties concerned is a further example of the type of information that may be required by the Commission, which should show that the appropriate legal redress is being awarded to the parties.

\(^{103}\) See section 166(4) (c) (ii).
satisfies the prescribed requirements for accreditation. There are however some challenges relating to the accreditation criteria, in that, the requirement that an entity would have to demonstrate that it has the necessary capacity to perform ADR services within the context of company law, before it can be accredited, is an unrealistic expectation for newly formed entities. A newly formed entity will not be able to indicate and/or demonstrate capacity to perform these services and such an entity will also not be able to gain the necessary ability to demonstrate what is required over the course of time as they will not be able to hear any disputes since they are not accredited entities, given that only the Tribunal or accredited entities are authorised to hear disputes.

The South Gauteng High Court in the recent judgment of Peel and Others v Hamon J&C Engineering (Pty) Limited and Others held that in as much as section 166 provided for alternative dispute resolution including arbitration, by certain accredited entities, the Arbitration Foundation of South Africa (“AFSA”) was not an accredited entity as defined in section 166(3) of the Act. What this means is that in as much as AFSA is a well-established alternative dispute resolution body it must still go through the accreditation process as provided for in section 166(4). It should however, be noted that, if there was any clarity and or meaning attached to the term “any other person” in the Act, then the court could have still considered AFSA as “any other person” in terms of section 166(1)(c) of the Act, and this could have given the interpretation and future application of section 166 more certainty.

9. **ANY OTHER PERSON**

According to section 167 of the Draft Companies Bill of 2007, which is the predecessor of section 166, only the Companies Ombud or an accredited entity could facilitate alternative dispute resolution proceedings. Although the newly enacted section 166(1) as amended by section 105 of the Companies Amendment Act 3 of 2011 (“the Amendment Act”) also mandates “any other person” to facilitate alternative dispute resolution proceedings there are

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104 See section 166(4)(a)(i) to (iii) of the Act. The Commission’s accreditation may be with or without certain conditions.

105 See Delport (n 42) 588-589.

106 2013 (2) SA 331 (GSJ) par 68.
some uncertainties, as already pointed out, centered around the lawmakers insertion of the words “any other person”.

The phrase “any other person” is not defined in the Act, neither does the Amendment Act give any clarity with regards to what is meant by the term “any other person” and what is of even greater concern is that the only part in the Act where reference is made to “any other person” is in section 166(1). The Amendment Act’s failure to address such uncertainties is to be regarded as a direct inconsistency with its preamble, which provides that the purpose of the Amendment Act is to, amongst other things, effect certain legal-technical and grammatical amendments in order to ensure the proper application and administration of the Act. The Amendment Act was meant to correct certain errors resulting from the inconsistency and ambiguity in the Act and it does not do this.

Regulation 132(1) of the Act only makes provision for the filing of a complaint with either the Tribunal or an accredited entity and no reference is made to “any other person”. Moreover, the Act only permits the Tribunal or an accredited entity to issue a certificate of failed dispute resolution where the alternative dispute resolution process has been unsuccessful.\(^\text{107}\) It is therefore, uncertain how unsuccessful ADR proceedings that have been referred to “any other person” will be dealt with. Moreover, section 167(1) of the Act, only makes provision for the formalisation of disputes that have been referred to either the Tribunal or an accredited entity. It is thus, uncertain how a matter that has been resolved by “any other person” will be formalised. The future applicability of section 166 in instances where a matter is facilitated by “any other person” unclear. Accordingly, it is the author’s submission that, in order to remedy the aforesaid uncertainty, when reference is made to the Tribunal or an accredited entity in the Act with regard to the issuing of a certificate of failed dispute resolution and/or the facilitation of alternative dispute resolution proceedings, then such reference should also include “any other person”. The author’s submission is based on the principle of reading-in.\(^\text{108}\)

\(^{107}\) Section 166(2).

\(^{108}\) Reading-in is predominantly used when there is an inconsistency caused by an omission, and it is necessary to add words to the statutory provision to cure it. The Courts are in a position to reconstruct a statute as much as they wish. See *S v Singo* 2002 (4) SA 858 (CC).
10. THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION

10.1 Introduction

As part of the extensive regulatory reform set out to be achieved by the Act, the Commission is a newly formed regulatory body established by section 185 of the Act aimed at achieving this objective. The Commission is an independent body that is subject to the Constitution of the Republic of South Africa, it combines the services of two agencies that operated under the Companies 61 of 1973 ("the old Act"), namely the Companies and Intellectual Property Registration Office (CIPRO) and the Office of Companies and Intellectual Property Enforcement (OCIPE). The Commission plays a pivotal role within the new company law dispensation and more specifically its role under section 166 of the Act is an important one. It is for this reason that its role and functions under the Act should be considered briefly.

10.2 Functions

The Commission is basically responsible for administering the requirements of the Act in respect to companies. Similarly to the Tribunal, the Commission has jurisdiction throughout the Republic of South Africa. Section 187(1) of the Act basically lists the Commission’s functions. The Commission is, inter alia, and what is relevant for the purposes of the current discussion, responsible for promoting the voluntary resolution of disputes. Section 187(1)(a) only caters for disputes arising in terms of the Act between a company on the one hand, and a shareholder or director on the other hand, as contemplated in Part C of Chapter 7. The Act does not stipulate how a person becomes accredited, what is merely

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109 Delport (n 42) 607.

110 See preamble of the Act.

111 section 185(2)(a).

112 section 187(1)(a).

113 It should however be noted that and as already pointed out above, the voluntary resolution of disputes is not only limited to disputes between the company and its shareholders or directors but extends to disputes with third parties that may have a relationship with the company. For example, a trade union representing the employees of the company and investors. Therefore, the Commissions functions will also extend to relationships between the company and other stakeholders.
stated in the Act are the requirements for accreditation. Therefore, in promoting the voluntary resolution of disputes, the Commission must educate and create the necessary awareness with regards as to how the accreditation process will work. For example, what documents are to be submitted, how long will it take for an entity to become accredited.


Resolving a matter through the voluntary dispute resolution process bypasses the procedures that would have been followed by the parties through the normal court process.\(^{114}\) The Act does not in itself prescribe a specific procedure to be followed by the parties during the alternative dispute resolution proceedings. Therefore, nothing prevents the parties from agreeing on a procedure that will be followed during such proceedings.\(^{115}\) The parties also have the option of following the procedures prescribed by the body facilitating the proceedings. Moreover, the parties are at liberty to refer a matter directly to arbitration, without having gone through the mediation and/or the conciliation process, unless of course agreed otherwise.

Section 167 flows from section 166 and it regulates how a matter that has been resolved through ADR can be formalised between the parties, if the Tribunal or an accredited entity has resolved or assisted the parties in resolving a dispute.\(^{116}\) The Tribunal or an accredited entity may record the resolution of the dispute in the form of an order and if the parties to the

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\(^{114}\) This is obviously subject to the voluntary dispute resolution process being successful. For example, the Rules of court require the parties to make discovery and to engage in pre-trial processes before a matter can be ripe for hearing at the trial stage. Whereas ADR methods and particularly mediation can be concluded within a limited period of time, sometimes within a day. See Principle 8.6 set out in (n 4) above.

\(^{115}\) The parties can, for example, agree that the claimant will be responsible for preparing a set of the indexed and paginated pleadings and that the arbitrator will make his/her award available to the parties after the closing argument, or within a specific time period. The parties can also come to an agreement with regards to the costs of the proceedings, where either the unsuccessful party bears the costs of the proceedings or where the parties agree to equally share the costs of the proceedings regardless of the outcome of the matter. The fact that the parties can regulate the way in which the proceedings will run, echoes the notion of party autonomy.

\(^{116}\) Delport (n 42) 589.
dispute consent to that order, then, submit it to a court with jurisdiction to be confirmed as a consent order in terms of the court’s rules.\textsuperscript{117}

If the parties wish to make the consent order a formal order of court then it is their responsibility to bring the necessary application before the court with the necessary jurisdiction. After hearing the application, the court can then either:(a) make the order as agreed and proposed in the application; (b) indicate any changes that must be made to the draft order before it will be made an order of court, or (c) refuse to make the order altogether.\textsuperscript{118} The court application may, for example, be necessitated by a respondent’s failure to comply with an arbitrator’s award, where the claimant wishes to enforce such an award. It is the author’s further submission that the applicant’s application to court may, under the relevant circumstances, also include a writ of execution against the respondent’s property. An order granted by the court in terms of section 167(2), may include an award for damages and if such an award does not include any such damages then the relevant party can apply to court for an award for civil damages.\textsuperscript{119} The constitutionality of such an award for damages has however, been challenged on the grounds that section 34 of the Constitution entitles everyone to approach the court and to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.\textsuperscript{120}

12. **THE GOOD FAITH REQUIREMENT**

The parties’ attitude is an important factor during the ADR process, in that the Act requires that the parties participating in such processes to do so in good faith.\textsuperscript{121} Therefore, if the Tribunal, or an accredited entity, concludes that either party to the mediation, conciliation or

\textsuperscript{117} section 167(1) (a) and (b).

\textsuperscript{118} Section 167(2) of the Companies Act.

\textsuperscript{119} See section 167(3).Damages can obviously only be awarded where the nature of the dispute permits the granting of such an award, in other words, an award for damages should be the appropriate remedy. For example, if the parties are seeking a declaratory order, then an award for damages would not be the appropriate remedy.

\textsuperscript{120} Delport (n 44) 589-590.

\textsuperscript{121} It important to note that the Act merely requires the parties to exercise good faith and not the *utmost* good faith, which is a higher standard.
arbitration is not participating in the process in good faith, or that there is no reasonable probability\textsuperscript{122} of the parties resolving their dispute through that process, then the Tribunal or accredited entity must issue a certificate in the prescribed form\textsuperscript{123} stating that the process has failed.\textsuperscript{124}

Furthermore, according to the Draft Rules\textsuperscript{125} a court may award costs against a party that has refused mediation, in instances where the matter was consequently referred to court and the court finds that the refusal was unreasonable and that mediation may have resulted in substantially the same finding as the court. It goes without saying that the ADR process would otherwise be fruitless if the parties are obstructive. Moreover, the good faith requirement is not exclusive to section 166(2) in that section 165(12)(a) also provides that an applicant acting under the auspices of section 165 must do so in good faith, meaning that the derivative proceedings launched by the applicant must be in the company’s best interests, and must relate to a serious question of material consequence to the company.\textsuperscript{126}

In labour law disputes, a party not only has a duty to negotiate (before referring a dispute to the CCMA), he or she has a duty to do so in good faith.\textsuperscript{127} An important element of the obligation to bargain in good faith is to meet and negotiate with the honest intention of reaching an agreement, where possible, as it is a give and take situation and the parties must compromise. Good faith bargaining entails that the purpose of the negotiations must be to reach an agreement.\textsuperscript{128}

\textsuperscript{122} This is an objective test.

\textsuperscript{123} A certificate of failed dispute resolution, must be in Form CTR 132.3, see Regulation 132(3).

\textsuperscript{124} Section 166(2).

\textsuperscript{125} See Rule 6(6).

\textsuperscript{126} This requirement together with section 165(11) which empowers the court to require security for costs deters any vexatious or frivolous actions against a director of the company. See, Cassim et al (n 29) 21.

\textsuperscript{127} This requirement was confirmed in NUM v East Rand Gold & Uranium Co Ltd 1992 4 ALL SA 78 (AD) 1992 (1) SA 700.

\textsuperscript{128} Joubert (ed) The Law of South Africa Vol 13(1), see further, SAEWA v Goede hoop Colliery (Amcoal) 1991 IJ 856 (IC) where it was stated that the willingness to compromise is a feature of good faith bargaining; also see ECCAWU v Southern Sun Hotel Interests (Pty) Ltd 2000 IJ 1090 (LC).
Furthermore, the element of good faith is also applicable to contractual disputes where it has been held that the law of contracts is, among other things, governed by good faith and that the parties’ intentions would be determined on the basis that they negotiated with one another in good faith.\textsuperscript{129}

13. **OTHER LEGISLATIVE PROVISIONS GUIDELINES**

Although alternative dispute resolution is no new concept in our law, the legislature’s initiative of introducing a re-defined concept\textsuperscript{130} of alternative dispute resolution within company law is to be welcomed. The Consumer Protection Act 68 of 2008, the National Credit Act 34 of 2005 and the Customs Excise Act 91 of 1964, are some of the examples that will be looked at, which also provide for the use of alternative dispute resolution measures. The Act closely resembles some of these examples and these examples may therefore be used as a point of reference and a guideline in remedying some of the shortcomings of the Act and in the future application and interpretation of the newly enacted section 166 of the Act.

13.1 The Consumer Protection Act 68 of 2008

13.1.1 Introduction

The advancement of ADR mechanisms in the place of the normal litigation process can be seen in the development of ADR processes in niche areas such as consumer law. Section 70(1) of the Consumer Protection Act 68 of 2008 ("the CPA") allows a consumer to resolve any dispute in respect of a transaction or agreement with a supplier, by referring the matter to an alternative dispute resolution agent. According to section 1 of the CPA an alternative dispute resolution agent may either be:(a) an ombud with jurisdiction; (b) an industry ombud accredited in terms of section 82(6) of the CPA,\textsuperscript{131} or (c) a person or entity providing

\textsuperscript{129}See *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA).

\textsuperscript{130}It is to be noted that the old Act also provided for the use of ADR tools, see section 72 of the old Act.

\textsuperscript{131}There is a direct similarity between the accreditation of an accredited entity in terms of section 166(3) and the accreditation of an industry ombud in terms of section 82(6) in that in both instances the accreditation process the Companies Commission and the National Consumer Commission are respectively, responsible for ensuring such accreditation.
conciliation, mediation or arbitration services to assist in the resolution of consumer disputes, other than an ombud with jurisdiction, or an accredited industry ombud. It is however, important to note that a consumer's rights can, in the appropriate circumstances, also be enforced through other mechanisms.

It is interesting to note that the CPA draws a distinction between an accredited entity on the one hand and an entity providing for conciliation, mediation or arbitration services to assist in the resolution of consumer disputes. In contrast, the Act defines an accredited entity as a body that is mandated to perform such services.

The CPA is aimed at ensuring the welfare of consumers by providing for a consistent, accessible and efficient system of consensual resolution of disputes arising from consumer transactions. As an alternative to referring a matter to court for adjudication, a consumer can refer the matter for alternative dispute resolution. This is provided that the supplier is subject to the jurisdiction of the respective ombud or alternative dispute resolution agent. If the alternative dispute resolution agent concludes that there is no reasonable probability of the parties resolving their dispute through the process provided for, then the parties should be notified that the process has been terminated. After this, the party who referred the matter to

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132 It is noteworthy to mention that, among the various forms of ADR processes the CPA, similarly to the Act, also limits these processes to the conciliation, mediation and arbitration processes.

133 What this essentially means is that entities that have the required expertise to facilitate alternative dispute resolution processes under the CPA will not necessarily and/or automatically qualify as accredited entities under the Act, unless they of course also have the necessary experience within the context of company law. See also section 166(4)(ii) of the Act.

134 See section 70(1) (a) – (d) of the CPA.

135 Section 69 of the CPA sets out these procedures. For a more detailed discussion on the enforcement mechanisms under the CPA, see Mupangavanhu “An Analysis of The Dispute Settlement Mechanism under the Consumer Protection Act 68 of 2008” 2012 PELJ 329.

136 See the purposes of the CPA, section 3(1) (g).

137 However, choosing the appropriate dispute resolution mechanism often depends on the circumstances of the particular complaint, see Mupangavanhu (n135) 322.

138 See section 70(1) of the CPA.
the agent may then file the complaint with the National Consumer Commission. The Act is silent with regards to the procedure that can be followed in instances where the ADR process has failed. Therefore, nothing prevents a party from also referring a complaint to either the Panel or the Commission in instances where the ADR process has failed. Although the CPA does not explicitly require the parties to participate in the process in good faith, it is implicit that the parties should participate in good faith in that an alternative dispute resolution agent will not be able to conclude that there is a reasonable probability of the parties resolving their dispute where there is mala fide.

If however, the process is successful and the alternative dispute resolution agent has resolved, or assisted the parties in resolving their dispute, the alternative dispute resolution agent may, similarly to the Act, formalise the proceedings by recording the resolution of the dispute in the form of an order.140

13.1.2 A Brief Comparison Between the National Consumer Commission and the Companies and Intellectual Property Commission

The National Consumer Commission ("the Consumer Commission") is primarily an investigative and enforcement body that has to discharge its duties in the most cost-effective and efficient manner.141 Similar to the Commission the Consumer Commission is, among other things, responsible for receiving complaints relating to alleged prohibited conduct or offence under the CPA and then to investigate and evaluate them. Like the Commission the Consumer Commission is the “watchdog” over consumer related matters as it is responsible for monitoring the consumer market to ensure that prohibited conduct and offences are prevented, detected and prosecuted. The Consumer Commission must also monitor the effectiveness of accredited entities consumer groups, industry codes and any regulatory authority exercising jurisdiction over consumer matters within a particular industry. The effectiveness of entities such as consumer protection authorities, ombuds and consumer

139 Section 70(2).

140 It should be noted that a consent order may, in the appropriate circumstances, be made an order of court, see section 70(3) (a) and (b) of the CPA. Similarly to the Act a consent order may include an award for damages, see section 70(4).

141 Section 85(2) of the CPA.
protection groups, with respect to the goods and services supplied to consumers by or through organs of state is observed by the Consumer Commission.\textsuperscript{142} It has been submitted that section 72(1)(b) read with section (72)(1)(d) of the CPA (seems) to suggest that the Commission will not investigate a complaint until the parties have successfully attempted to resolve the dispute by consent through an alternative dispute resolution agent, a provincial consumer protection authority, or a consumer court.\textsuperscript{143}

13.1.3 A Brief Comparison Between the National Consumer Tribunal and the Companies Tribunal

As already pointed out a consumer can enforce its rights in terms of the CPA, or in terms of a transaction or agreement by \textit{inter alia} referring the matter directly to the National Consumer Tribunal ("the Consumer Tribunal"), in instances where such a direct referral is permitted by the CPA.\textsuperscript{144} The Consumer Tribunal is a regulatory body that is established in terms of section 26 of the National Credit Act 34 of 2005 ("the NCA"). The Tribunal and the Consumer Tribunal have similar structures.\textsuperscript{145} Therefore, the Tribunal may as well be modelled along the same lines as the Consumer Tribunal. It should however, be noted that the Consumer Tribunal’s area of jurisdiction traverses two pieces of legislation, that being, the NCA and CPA. The Consumer Tribunal shares its area of function with other courts existing or established in terms of provisional legislation. A decision of one member of the Consumer Tribunal is appealable to a full panel comprising of three members. Otherwise decisions are reviewable by and appealable to the High Court.\textsuperscript{146} Although the Tribunal’s adjudicative functions are beyond the scope of the current discussion, it should however be mentioned that the Tribunal, unlike the Consumer Tribunal, does not offer any interim relief pending the finalisation of a matter that is being adjudicated.

\textsuperscript{142}Mupangavanhu (n135) 324 read with sections 99( c) and 95(2)(a) of the CPA.

\textsuperscript{143} Mupangavanhu (n135) 325 and the authority quoted in footnote 35 thereto.

\textsuperscript{144} See section 69(1)(a) of the CPA.

\textsuperscript{145}Both the Tribunal and the Consumer Tribunal are composed of the same number of members, and they both have jurisdiction throughout the Republic of South Africa, see section 26(1)(a)and 26(2) of the National Credit Act 34 of 2005 and section 194(4) of the Act.

\textsuperscript{146}Manamela (n 99) 32.
Before a credit provider and/or a consumer can directly approach the Consumer Tribunal in respect of any dispute between them, it is incumbent upon the parties to first attempt to resolve the dispute directly between themselves and if they are unable to do so to refer the dispute to an alternative dispute agent,\textsuperscript{147} to facilitate the conciliation, mediation or arbitration process.\textsuperscript{148} Section 134 echoes the NCA’s objective of \textit{inter alia} providing a consistent and accessible system for the consensual resolution of disputes arising from credit agreements.\textsuperscript{149} Moreover, as an alternative to filing a complaint with the National Credit Regulator in terms of section 136 of the NCA, a person may refer a matter that could be the subject of such a complaint to either an ombud with jurisdiction,\textsuperscript{150} a consumer court or an alternative dispute resolution agent, for resolution by conciliation, mediation or arbitration.\textsuperscript{151} The NCA therefore provides for the resolution of disputes through ADR tools in two different circumstances, that being, as an alternative to referring a matter to the National Credit Regulator or before referring a matter to the Consumer Tribunal. In each circumstance there are different consequences that follow the termination of the ADR proceedings.

On the one hand, a respondent in a matter referred to an alternative dispute resolution agent in terms of section 134(1) (b)(ii), instead of referring a matter to the National Credit Regulator, has the right to object to that referral in writing within 10 business days.\textsuperscript{152} However, a

\textsuperscript{147} Meaning a person providing services to assist in the resolution of consumer credit disputes through conciliation, mediation or arbitration, see section 1 of the NCA.

\textsuperscript{148} Section 134(4)(a) read with section 134(4)(b)(ii)(bb) of the NCA. It is equally as important to note that a matter can, in the appropriate circumstances, also be referred to an ombud with jurisdiction or a consumer court, see section 134(4)(b)(i) and (ii)(a).

\textsuperscript{149} See section 3(h) of the NCA.

\textsuperscript{150} See section 134(1)(a) of the NCA , this is in instances where the credit provider is a financial institution as defined in the Financial Services Ombud Schemes Act 37 of 2004.

\textsuperscript{151} See section 134(1)(b)(i) and (ii), provided that the credit provider is not a financial institution as defined in the Financial Services Ombud Schemes Act 37 of 2004

\textsuperscript{152} The matter will then either be deemed as a complaint that has been filed with the National Credit Regulator or as an application with the Consumer Tribunal, see section 134(2)(b) and (c). It may therefore, at this point be suggested that the same approach can be adopted under the Act. Meaning that, where the ADR proceedings have
respondent that objects to the referral of a matter to an alternative dispute resolution agent without any merit faces the risk of having a costs order being awarded against him/her/it. A matter that has, on the other hand, been referred to conciliation, mediation or arbitration in terms of section 134(4)(b)(ii)(bb), that is, before referring a matter to the Consumer Tribunal, will be terminated if the alternative dispute resolution agent concludes that either party is not participating in that process in good faith or that there is no reasonable probability of the parties resolving their dispute through that process. The alternative dispute agent must then issue a certificate in the prescribed form stating that the process has failed. One immediately sees the striking similarities, of the good faith requirement, between section 166(2) of the Act and section 134(5) of the NCA.

13.3 The Customs & Excise Act 91 of 1964

The Customs & Excise Act 91 of 1964 (“the Customs Act”), is another example of the use of ADR mechanisms within the South African statutory framework. The terms governing the alternative dispute resolution proceedings under the Customs Act are set out in schedule “A” of the Rules promulgated under the Customs Act (“the Rules”). According to Schedule “A” of the Rules ADR proceedings may either be initiated by: (a) a person dissatisfied with the Commissioner’s decision or an appeal committee under the internal administrative appeal procedure contemplated in Part A of Chapter XA of the Customs Act; or (b) the Commissioner subsequent to the receipt of a notice in terms of section 96(1) of the Customs Act. It should also be noted that the ADR mechanisms are only available to parties who accept the terms set forth in schedule “A” of the Rules. Moreover, both the Commissioner and

been terminated in terms of section 166(2) then the matter can be deemed as a complaint filed with the Commission or the Panel as the case may be.

153This is if the Consumer Tribunal is of the opinion that the matter could have been properly resolved by conciliation, mediation or arbitration carried out in good faith; see section 134(3).

154That being a certificate in Form 28, that is to be completed by the alternative dispute resolution agent, see Regulation 49 of the National Consumer Regulations.

155See section 134(5).
the aggrieved person have to agree to have the matter resolved through the ADR process in order for any agreement or settlement, resulting from such a process, to have an effect.\textsuperscript{156}

14. ALTERNATIVE DISPUTE RESOLUTION A CORPORATE GOVERNANCE TOOL AND THE KING III REPORT

14.1 Introduction

In his speech delivered at the launch of Tokiso Commercial Dispute Settlement (Pty) Ltd,\textsuperscript{157} in Johannesburg on 18 March 2008, John Myburgh mentioned that the King III Report on Corporate Governance will require company directors to consider alternative dispute resolution mechanisms before resorting to litigation. This is based on a director’s fiduciary duties towards the company and the management of risk.

There is always a link between good corporate governance and compliance with the law, in other words good governance is not something that exists separately from the law and it is entirely inappropriate to un hinge governance from the law.\textsuperscript{158} The purpose of this section is consequently aimed at highlighting the use of ADR measures as corporate governance tools.

Corporate governance essentially relates to the way in which companies are directed and controlled, in other words, corporate governance relates to the principles and practices which are regarded as appropriate conduct by directors and managers of a company.\textsuperscript{159} Furthermore, South Africa’s corporate governance regime is fundamentally, governed by a set of principles that have been compiled by the King Committee with the help of its subcommittees,\textsuperscript{160} commonly known as the King III Code of Governance Principles (“the King III”).

\textsuperscript{156}See section 771 (a) of the Customs Act. This reiterates the consensual nature of voluntary dispute resolution proceeding.

\textsuperscript{157}Tokiso is a private and independent dispute resolution company http://www.tokiso.com/images/stories/brochure/tokiso_%20brochure_all%20services.pdf (22-01-12014).

\textsuperscript{158}(n 4) above 7.

\textsuperscript{159}King “The Synergies and Interaction between King III and the Companies Act 61 of 2008” 2010 \textit{Acta Juridica} 447.

\textsuperscript{160}(n 4) above 5.
14.2 The Philosophy Behind the King III Code of Governance Principles and the Application

The changes in international corporate governance trends and the enactment of the Act have necessitated a review of South Africa’s corporate governance regime. These changes have also made it rather necessary for South Africa’s corporate governance practice to be in line with international trends. The King Committee has identified the use of ADR tools as an internationally emerging governance trend which has consequently been incorporated into the King III Code.\textsuperscript{161}

Although King III is a voluntary measure, in that companies are at liberty to choose whether or not to apply its principles, it applies to all entities, in contrast to the King I and the King II code, regardless of the manner and form of incorporation or establishment and whether in the public, private or non-profit sectors.\textsuperscript{162} As a result, companies should by way of explanation make a positive statement about how the principles in the Code have been applied or have not been applied.

14.3 Governing Stakeholder Relationships: Principle 8.6

The King III Code is divided into nine chapters and Chapter 8 fundamentally deals with stakeholder relationships. Principle 8.6 of Chapter 8 provides that the board of a company should ensure that disputes are resolved as effectively, efficiently and expeditiously as possible. This means that the needs, interests and rights of the disputing parties must be taken into account and that the dispute resolution mechanism should be cost effective and should not be a drain on the finances and resources of the company.\textsuperscript{163} Directors therefore, have a duty of care towards the company to ensure that disputes with and within the company are resolved in a way that is relatively affordable and that is not time consuming.\textsuperscript{164} Principle 8.6 further provides that internal disputes may be addressed by recourse to the provisions of the

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\textsuperscript{161}(n 4) above 14.

\textsuperscript{162} (n 4) above 17.

\textsuperscript{163} Principle 8.6 set out in (n 4) above.

\textsuperscript{164} See Principle 8.6 of King III. It should however be noted that private arbitration might be more expensive than litigation as the arbitrator will charge fees while magistrates or judges do not. See (n 137) 329.
Act and by ensuring that internal dispute resolution systems within a company are in place and that they function effectively. Moreover, external company disputes may be referred to arbitration or a court. However, and as it has already been shown, the Act provides for alternatives to the normal court process which will result in a win-win situation for the parties where the interests of the disputing parties need to be addressed and where commercial relationships need to be preserved and even enhanced.

15. **CONCLUSION AND THE WAY FORWARD**

Alternative dispute resolution is a fast growing aspect of our law and this is evidenced by the enactment of the new section 166 of Companies the Act 71 of 2008, Principle 8.6 of the King III Report and the Draft Mediation Rules for the High Court and Magistrates Court.

Although the Act may have its flaws, it is anticipated that it will bring about some radical changes under the new company law dispensation. As already pointed out, the use of alternative dispute resolution mechanisms within a company law perspective are not steadfast and there aren’t any hard and fast rules on how the use of alternative dispute resolution mechanisms will work under the new company law dispensation. The legal certainty will therefore have to be determined by the courts. The anomalies that have been pointed out can be cured by reforming the law. Moreover, section 166 is to a large extent modeled on other statues and should therefore, not be read in isolation but in conjunction with other relevant statues.

Resolving disputes in an amicable way versus the normal court process will reap rewards for the parties as this will have the effect of meeting the needs of the parties and preserving relationships. It is important for the parties to choose the appropriate dispute resolution mechanism that will be best suited for the dispute at hand, it is also equally as important to note that the use of alternative dispute resolution mechanisms will not always be an appropriate enforcement remedy as it is sometimes more appropriate to directly approach the court for the necessary relief. The mediation, conciliation, and arbitration process are the most common forms of alternative dispute resolution processes.

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165 principle 8.6 set out in Delport (n 4) above.

166 principle 8.6 set out in Delport (n 4) above.
Since it’s coming into operation in 2011 the Act has only evidenced one reported case under section 166 unlike the other newly enacted provisions of the Act that have evidenced more than one reported case. This is a possible indication that not many are aware of the newly enacted section 166 and can therefore not apply it or that the other enforcement remedies that are being used under the Act are working smoothly. The Tribunal is placed on equal footing with the so-called accredited entities and any other person that may facilitate alternative dispute resolution proceedings under the auspices of section 166, in terms of the powers and mandate conferred on such entities under section 166.

Although the Tribunal has not facilitated any ADR proceedings under section 166, it is the Commission’s duty to promote the use of alternative dispute resolution mechanisms within company law. The application of section 166 is not limited to instances where a complaint has been filed with the Commission as suggested by the wording of section 166(1) but it also extended to instances where a complaint has been filed with the Panel. In fulfilling their fiduciary duties towards the company, directors essentially need to consider the use of alternative dispute resolution mechanisms before turning to the courts for relief. The enactment of the new Act is to be welcomed. The Act is, among other things, aimed at providing appropriate legal redress. In order to achieve the aims of the Act the appropriate enforcement remedies set out in the Act need to be used.
BIBLIOGRAPHY:

BOOKS

5. Delport *Henochsberg on The Companies Act 71 of 2008*

LEGISLATION

1. Arbitration Act 42 of 1965
2. Companies Act 71 of 2008
3. Companies Act 61 of 1973
4. Companies Amendment Act 3 of 2011
7. Customs & Excise Act 91 of 1964
8. Financial Services Ombud Schemes Act 37 of 2004
9. National Credit Act 34 of 2005
10. The (South African) Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977
11. UNCITRAL Model Law on International Arbitration

CASE LAW

1. Antigen Laboratories LTD [1951] 1 ALL ER 110 (CH)
2. Breetveldt v van Zyl 1972 1 SA 304 (T)
3. Eccawu v Southern Sun Hotel Interests (Pty) Ltd 2000 ILJ 1090 (LC)
4. Foss v Harbottle (1843) 2 Hare 461; 67 ER 189
5. Grancy Property Limited v Manala and Others 2013 JOL 30705 (SCA)
6. Lourenclo v Ferela (Pty) Ltd (no 1) 1998 3 SA 281 (T)
7. Mouritzan v Greystone Enterprises (Pty) Ltd 2012 5 SA 74 (KDZ)
8. Msimang No and Another v Khatuliba and Others 2013 1 ALL SA 580 (GSJ)
9. National Treasury and Others v Opposition to Urban Tolling Alliance and Others (Road Freight Association as applicant for leave to intervene) 2012 11 BCLR 1148 (CC)
10. Nick's Fishmonger Holdings (Pty) Ltd v De Sousa 2003 2 SA 278 (SE)
11. NUM v East Rand Gold & Uranium Co Ltd 1992 4 ALL SA 78 (AD) 1992
12. PCL Consulting (Pty) Ltd v Tresso Trading 119 (Pty) Ltd 2009 4 SA 68 (SCA)
13. Peel and Others v Hamon J&C Engineering (Pty) Ltd and Others 2013 2 SA 331 (GSJ)
14. S v Singo 2002 4 SA 858 (CC)
15. Saewa v Goedehoop Colliery (amcoal) 1991 ILJ 856 (IC)
17. Universiteit van Stellenbosch v JA Louw 1983 (4) SA 321
18. World Marine & Offshore Supply Co. (Pty) Ltd the Tribunal CTR 12/07/2013
JOURNAL ARTICLES

4. Sedutla “The Launch of Court-Based Mediation Pilot Project” January 2012 *De Rebus* 8

INTERNET SOURCES

1. [http://www.tokiso.com/images/stories/brochure/tokiso_%20brochure_all%20services.pdf](http://www.tokiso.com/images/stories/brochure/tokiso_%20brochure_all%20services.pdf) (22-01-12014) tokiso is a private and independent dispute resolution company

OTHER SOURCES

1. Butterworths *forms and precedents* issue 3-2003
2. The Department of Trade and Industry, Explanatory Memorandum on the Companies Bill (2007)
3. Draft Companies Bill of 2007